Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

IN RE GEORGE C. HOOK,

Petitioner,

Petition For Writs Of Certiorari, Mandamus Prohibition, And Supervision To The United States Court Of Appeals For The Seventh Circuit, The United States District Court For The Central District of Illinois, And The United States Attorney

PETITION FOR WRITS OF CERTIORARI, MANDAMUS, PROHIBITION AND SUPERVISION

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QUESTIONS PRESENTED

Whether a person must suffer through a criminal trial the subject matter of which is not a federal crime before his right not to be prosecuted therefor is vindicated.

Whether federal prosecution under 18 U.S.C. § 664 is precluded by another federal district court's final determination that the subject Plan was not a Title I Plan under ERISA at the time of the alleged federal criminal violations, that being an essential element of the federal offenses charged.

Whether preclusion from prosecution is a proper subject for mandamus, interlocutory appeal, or other form of pretrial remedy.

Whether a person must suffer through a criminal trial in a venue in violation of the Sixth Amendment to the Constitution.

Whether prosecution can occur where none of the alleged federal criminal conduct occurred simply because that venue is more convenient for the prosecution.

Whether the right to preclude trial in an unconstitutional venue is a proper subject for mandamus, interlocutory appeal, or other form of pretrial remedy.

Whether a supervisory writ is appropriate to correct an appellate court that ignores the issues of preclusion and venue presented to it in a petition for extraordinary writs.

Whether District Judge McDade who stated at first hearing his desire that Defendant Hook be found guilty should have been disqualified for bias by the Court of

QUESTIONS PRESENTED – Continued

Appeals upon mandamus petition therefor pursuant to 28 U.S.C. §§ 455(a) and (b) and his immediately preceding denials of motions to dismiss and change venue vacated.

Whether District Judge McDade should have been disqualified by the Court of Appeals upon mandamus petition pursuant to 28 U.S.C. §§ 455(a) and (b)(1) and (4) from presiding over the prosecution of Defendants, one of whom, Viana, a defendant and the other, Hook, counsel in a prior civil case in which he determined the same issue on summary judgment favorably to them on the count that his attorney wife's major insurance company client provided defense and coverage and unfavorably to them on the count that his wife's client did not provide defense and coverage.

Whether a supervisory writ is appropriate to correct an appellate court that ignores facts of record and applicable law because they are contrary to its preconceived notions as to disqualification.

Whether District Judge McDade's order disqualifying himself after mandamus is denied moots the denial of the mandamus petition which also sought to vacate Judge McDade's denial of motions to dismiss the indictment, preclude prosecution and change venue.

Whether Judge McDade's disqualification of himself pursuant to 28 U.S.C. § 455(a) and (b) following the Seventh Circuit Court of Appeals decision moots appeal of any of the errors of that decision to the Supreme Court.

QUESTIONS PRESENTED – Continued

Whether the filing of the superseding indictment following the Seventh Circuit Court of Appeals decision moots the appeal of any of the errors of that decision to the Supreme Court.

Whether the application of 18 U.S.C. § 2 to co-defendants where the crimes alleged are not against the United States of America constitutes prosecutorial and judicial abuse to be prevented by a pretrial supervisory writ.

Whether the use of a superseding indictment as an obvious attempt to moot applications for extraordinary writs constitutes prosecutorial and judicial abuse to be prevented by a pretrial supervisory writ.

PARTIES

The parties to the proceeding are:

Petitioner: George C. Hook

Respondents: The Seventh Circuit Court of Appeals

The District Court for the Central District of Illinois

The United States Attorney for the Central District of Illinois

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PETITION FOR WRITS

George C. Hook respectfully prays that the Supreme Court review the opinion of the United States Court of Appeals for the Seventh Circuit of July 9, 1996, *Hook v. McDade*, 89 F.3d 350 (7th Cir. 1996) (App. 1), which conflicts with cases decided by other Courts of Appeals and the Supreme Court and ignores preclusion of prosecution and venue issues which the Constitution requires be addressed; review the Seventh Circuit Court of Appeals' denial of Hook's motion for rehearing with suggestion for rehearing *en banc* on August 19, 1996, *Hook v. McDade*, 1996 U.S. App. LEXIS 21401 (App. 16); exercise the Supreme Court's supervisory authority with respect thereto and also exercise such authority with respect to the conduct of the District Court for the Central District of Illinois; and prohibit federal prosecution absent federal crimes and proper venue.

Hook respectfully prays that writs of mandamus, prohibition and supervision issue against the Seventh Circuit Court of Appeals, the District Court for the Central District of Illinois and the United States Attorney for the Central District of Illinois.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit that gives rise to this Petition for writ of certiorari is reprinted in the Appendix hereto ("App.") at page App. 1 and published at 89 F.3d 350. By order dated August 19, 1996, the Seventh Circuit Court of Appeals denied the petition for rehearing and suggestion

for rehearing *en banc.*, which is reprinted in the Appendix hereto at page App. 13.

The opinion of the United States Court of Appeals, the conduct of the District Court for the Central District of Illinois and the conduct of the United States Attorney give rise to this petition for writs of mandamus, prohibition and supervision. The conduct of the District Court and the United States Attorney cannot be adequately addressed without extensive reference to the record, which the opinion of the Seventh Circuit Court of Appeals ignored.

JURISDICTION

On July 31, 1995, Hook filed his petition in the United States Court of Appeals for the Seventh Circuit seeking writs of mandamus and prohibition to (i) disqualify Central District Judge McDade pursuant to 28 U.S.C. § 455 for actual and apparent bias and for financial interest, (ii) prohibit prosecution for conduct which cannot be alleged or proven to be federal crimes, based upon the determination by another federal District Court, which Judge McDade ignored, (iii) transfer the prosecution from a Constitutionally improper venue, Judge McDade having summarily denied a motion therefor based upon factual misrepresentations by the prosecutor and his own misperceptions of basic legal principles, and (iv) cure apparently endemic judicial and prosecutorial misconduct in the Central District of Illinois, each remediable only by extraordinary writs.

On July 9, 1996, the United States Court of Appeals for the Seventh Circuit denied Hook's petition for extraordinary writs and issued its opinion in support thereof (App. 1). On August 19, 1996, the United States Court of Appeals for the Seventh Circuit denied Hook's timely-filed motion for rehearing and suggestion for rehearing *en banc* (App. 16).

Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days after the denial of rehearing.

The jurisdiction of the Supreme Court is invoked pursuant to Article III of the Constitution, 28 U.S.C. § 1254, 28 U.S.C. § 1651(a) and Supreme Court Rules, with respect to writs of certiorari under Part III thereof, and, with respect to extraordinary writs under Part IV thereof.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Constitutional and Statutory provisions involved in this case are cited here and set forth in the Appendix, beginning at page App. 17.

CONSTITUTION:

Article III, Section 2

5th Amendment

6th Amendment

8th Amendment

9th Amendment

10th Amendment

STATUTES OF THE UNITED STATES:

18 U.S.C. § 2 (in its current form at all times relevant to this case)

18 U.S.C. § 2 (in its prior form)

18 U.S.C. § 664 (as in effect at time of alleged conduct)

18 U.S.C. § 1343 (as in effect at time of alleged conduct)

18 U.S.C. § 1956(a)(1)(B)(i) (as in effect at time of alleged conduct)

28 U.S.C. § 455 (as in effect at time of alleged conduct)

28 U.S.C. § 1254

28 U.S.C. § 1651

28 U.S.C. § 2106

29 U.S.C. § 1348 (as in effect at time of all relevant conduct with relevant references to 1342 footnoted)

STATEMENT OF THE CASE

The case began as a federal criminal prosecution against Carmen Viana and George C. Hook in the United States District Court for the Central District of Illinois. The case proceeded to the Seventh Circuit Court of Appeals pursuant to Hook's petition (i) for extraordinary writs, as described in Federal Appellate Rule 21 to disqualify Judge Joe Billy McDade pursuant to 28 U.S.C.

§§ 455(a), 455(b)(1) and 455(b)(4); (ii) for vacation of orders entered by Judge McDade denying Hook's motion to dismiss and for change of venue, among others; and (iii) for prohibition of prosecution by reason of a fatally defective indictment, in particular, preclusion of the federal government from a prosecution based on conduct that could not constitute any federal crime by virtue of a contrary federal judicial determination and on provisions of federal statute. ERISA, Title IV.

The case had proceeded in the District Court on an indictment filed on February 23, 1995 under seal against Carmen Viana, a Brazilian citizen who had also been a resident alien, and George C. Hook, which falsely alleged violation of 18 U.S.C. § 664, and dependent charges of wire fraud [18 U.S.C. § 1343] and money laundering [18 U.S.C. § 1956(a)(1)(B)(i)]. The 1909 version of 18 U.S.C. § 2 was invoked to ascribe the conduct of each co-defendant to the other even though the predicate for its application was not present in that no crimes against the United States of America were alleged contrary to Section 2 in its current form.

A warrant for Viana's arrest was issued on February 24, approximately one year after she and her business had declared bankruptcy and she had departed the country, having no apparent reason to remain. Repeatedly in the proceedings Viana has been mischaracterized by the prosecutor, the Central District Court of Illinois and the Seventh Circuit Court of Appeals as having fled so to treat her, improperly, as a fugitive from justice with all of its unconstitutional detriments to her and to Hook, especially pursuant to 18 U.S.C. § 2.

Failing in its unlawful attempts to cause Viana's return from her native Brazil, or wherever, so she could be arrested and incarcerated without bail pending her unconstitutional trial, on March 21, 1995, the indictment was unsealed and a summons issued against Hook, who was served deceptively by the United States Marshall on April 13, 1995, compelling him to appear before Magistrate Kauffman on April 24, 1995, which he did.

On May 25, 1995 Magistrate Kauffman entered a plea of not guilty for Hook who declined to plead because of his assertion in his then pending motion to dismiss that no federal crimes had been alleged requiring a plea and his assertion in his then pending motion for transfer that the Central District of Illinois was not the proper Constitutional venue nor the appropriate place for prosecution and trial under applicable federal law since the indictment did not allege that crimes had been committed in that venue and that venue was extremely inconvenient for almost everyone except the prosecutor.

On June 29, 1995, Hook appeared before Judge McDade for the first time,[1] pursuant to his order of June 20, 1995 that all motions be set for hearing that date. The prosecution had filed its response to Hook's month old motion to dismiss pursuant to that order, and its venue response immediately before. Immediately thereupon Hook filed his motion seeking leave to file replies thereto, attaching them as exhibits. Judge McDade denied Hook's motion for leave to file his responses. Judge McDade then

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[1] The Central District Docket errs in stating that Hook appeared before Judge McDade for arraignment. Magistrate Kauffman did the arraignment.

denied Hook's motion to dismiss, asserting (i) that preclusion could not apply to a criminal case and (ii) that any defects in the indictment could be cured by discovery; and denied Hook's motion for change of venue because of the convenience of Judge McDade's courtroom to the prosecutor.

In view of Judge McDade's conduct and demeanor at the first hearing and after confirming Mrs. McDade's involvement as counsel for co-defendant Viana, on July 7, 1995, Hook filed a motion to disqualify Judge McDade and vacate Judge McDade's motion denials. This petition was heard at the pretrial conference previously set for July 14, 1995. Amidst Judge McDade's injudicious and emotional display and unfounded, denigrating personal attacks on Hook, Judge McDade refused to disqualify himself.

The Court of Appeals accepted Hook's petition for extraordinary writs, called for answer, briefs and oral argument, and then issued an opinion, which ignored the evidence of Judge McDade's bias, including (i) his first hearing statement that he desired Hook's conviction, and (ii) his conflicting opinions in *Cannon v. Viana et al.*, Case No. 92-1383 (C.D.Ill. 1994), asserting that the record was devoid of bias or even the appearance of bias. The opinion failed to address preclusion, venue and all challenges to the indictment.

REASONS FOR GRANTING THE WRITS

Preclusion. The essential predicate for prosecution of Hook and Viana is that the Plan, as to which they are

alleged (falsely) to have violated 18 U.S.C. §§ 664, 1343 and 1956, be subject to Title I of ERISA. Otherwise there is no federal offense.

Congress has provided that on and after the plan termination date, Title I of ERISA does not apply to the terminated plan, 29 U.S.C. § 1348(a)(4), *Graves v. Barnes*, 405 U.S. 1201 (1972); *Nachman Corp. v. PBGC*, 446 U.S. 359 (1980); *PBGC v. Heppenstall*, 633 F.2d 293 (3d Cir. 1980); *PBGC v. Scherling*, 905 F.2d 173 (8th Cir. 1990); *Murphy v. Heppenstall*, 635 F.2d 233 (3d Cir. 1980); *In re Maryland Glass Corp.*, 618 F. Supp. 1410 (D.C. Md. 1985), aff'd 814 F.2d 655 (4th Cir. 1987); *Trippet v. Smith*, 592 F.2d 1112 (10th Cir. 1979); *ERISA Consultants v. PBGC*, 991 F.2d 1415 (8th Cir. 1993); *U.S. v. Bell*, 22 F.3d 274 (11th Cir. 1994).

Prosecution of Hook and Viana is directly contrary to this statute and the determination that the Federal District Court has already made pursuant to that statute that on and after February, 1991 the Plan is not a Title I Plan in the case of *PBGC v. Wittek Industries, Inc. as administrator for the Retirement Plan for United Steel Workers Local #6141 Employees of E.C. Manufacturing Division of Wittek Industries, Inc.*, Civil No. 3:95CV117-MCK ("*PBGC v. Wittek Industries, Inc.*") (App. 1). The Retirement Plan was terminated by judicial decree instigated and obtained pursuant to statutory authority[2] by the United States of America.[3] The United States of America precluded itself and everyone from asserting that essential element or proving it by

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[2] 29 U.S.C. 1342

[3] Created by 29 U.S.C. 1302, the Pension Benefit Guarantee Corporation is a body corporate within the Department of Labor of the United States of America.

proceeding in the case of *PBGC v. Wittek Industries, Inc.* and having obtained therein the determination of a United States District Court that the Plan terminated on February 13, 1991.

Prosecution with respect to a terminated plan under a criminal provision confined to Title I plans is contrary to these cases. The ramifications to ERISA and to the national policy it expresses if this prosecution is to proceed are mind boggling and catastrophic in their effect on the public's employment and retirement welfare. *In re Pension Plan for Employees of Broadway Maintenance Corp. v. PBGC*, 707 F.2d 647, 648-9 (2d Cir. 1983); *PBGC v. Dicenso*, 698 F.2d 199, 200-1, 203 (3d Cir. 1983). Obviously, it will also have such an adverse effect on the judicial system and on the perceptions of due process and fairness which should be inherent therein.

Hook moved to dismiss the Indictment because the Plan was not a Title I Plan and therefore Plaintiff was precluded by *PBGC v. Wittek Industries, Inc.*, its own action, from prosecuting Defendants as if the Plan were a Title I Plan. Preclusion is appropriate for interim review by mandamus and also under the collateral order doctrine.

A writ of mandamus should issue also because both Judge McDade and Judge Coffey[4] committed clear abuses

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[4] See "Evaluation of the United States Court of Appeals for the Seventh Circuit," 43 DePaul Law Review 673 (Spring, 1994), a thorough and thoughtful study that criticizes Judge Coffey for rarely acknowledging serious factual or legal uncertainties and failing to acknowledge the legitimacy of competing arguments

of discretion, *Mallard v. U.S. District Court*, 490 U.S. 296, 309 (1989), and clear errors of law, there are no other means of adequate relief and their abuse and error will cause irreparable injury. Judge McDade was abusive by denying Hook reply, injudiciously and without any reflection immediately ruling as he did on bases which are contrary to law. Such conduct requires remedy by the issuance of mandamus, *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948), *IBM Corp. v. Edelstein*, 526 F.2d 37, 40, 45 (2d Cir. 1975). That there is no other adequate means of relief is also clear because the two issues are whether prosecution is precluded altogether under 18 U.S.C. § 664 and the charges dependent thereon, §§ 1343 and 1956, and whether such prosecution can occur in Peoria after timely objection without violating Hook's constitutional right to be tried solely in a federal venue where the conduct occurred and only if the conduct is a federal crime. Hook cannot be tried. Such a trial is beyond the federal judicial power, Constitution, Article III, Section 2. Such a trial violates due process guaranteed by the 5th Amendment to the Constitution. Such a trial is cruel and unusual punishment in violation of the 8th Amendment to the Constitution. Such conduct violates

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and concerns that differ from his result oriented attempts to prove that his preconceived result is the right one. Judge Coffey is the subject of substantial criticism from attorneys in the Circuit for an unacceptably large number of opinions that evidence these faults and for other injudicious conduct. These problems have been apparent for a considerable time. See Romenesko, "Disorder in the Court," *Milwaukee Magazine*, March, 1987, a lengthy article about Judge Coffey that contains similar reports that are consistent with the "Evaluation." These problems are continuing, as shown by his opinion in this case.

the 9th and 10th Amendments to the Constitution. Relegating a defendant solely to appeal after conviction and sentence in such circumstances causes irreparable harm.

The manner by which Judge McDade arrived at his erroneous decisions and their clearly erroneous bases demonstrate the need to issue the requested writs of mandamus and prohibition, to directly consider the substantive issues of preclusion and venue, to achieve supervisory and instructional goals and, because of the application of the ERISA preclusion to a criminal prosecution, to resolve an issue of first impression differently from Judge McDade, *United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 1986); *In re IBM*, 687 F.2d 591 (2d Cir. 1982); *In re International Business Machines*, 45 F.3d 641 (2d Cir. 1995); *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996); *United States v. Harper*, 729 F.2d 1216, 1220 (9th Cir. 1984); *Towers Hotel Corp. v. Rimmel*, 871 F.2d 766 (8th Cir. 1989); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 98 (3d Cir. 1992); *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 167-8 (3d Cir. 1993).

Furthermore, although included as an element of the offense described by 18 U.S.C. § 664, the Title I plan requirement is one which a rational legal system would deem too complex and esoteric to be left to laymen. Although, if the prosecutor and the Courts decline to take it up, there is no other choice than that. In that last resort, the jury must decide the legal issue and become enmeshed in the intricate interrelationships of ERISA, statutory preclusion and another court's preclusive determination of the issue before them.

The jury may be more competent to determine where conduct occurred in order to arrive at a determination whether it is a proper jury hearing this case in the correct constitutional venue. However, it makes no sense to begin trial in the wrong venue with the wrong jury, reserving those issues to trial's end and having to begin again, all of the expenditures for naught.

Such constraining impacts on the conduct of the trial and the defense as well as the fact, as here, that the matter was one of first impression are what compelled the grant of mandamus in *United States v. Harper*, 729 F.2d 1216 (9th Cir. 1984). The Supreme Court has determined that mandamus lies to review issues of first impression in order to settle new and important problems, *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), *Thermtron Products Inc. v. Hermansdorfor*, 423 U.S. 336, 352-53 (1976). The precise preclusion issue presented here has not been addressed heretofore by any federal court. Therefore mandamus also lies to review this issue as an "issue of first impression" in order to "settle new and important problems."

Such constraining impacts also describe the irreparable harm inherent in Judge McDade's decisions. Hook is thereby subjected to the time, effort, expense, pain, and suffering of a trial, knowing from the outset, that with the two unresolved issues the trial is all for naught and ultimate resolution is substantially delayed; knowing that the trial will not affect the outcome. Such a useless prospect would seem compelling reason for not embarking on this course. The issue is collateral to guilt or innocence. It is dispositive of the case. Plaintiff has no right to prosecute anyone except for federal crimes. The Defendants have a right not to be prosecuted except for federal

crimes. No federal crimes exist because the critical element, Title I status, is missing. *Abney v. United States*, 431 U.S. 651 (1977) and *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) and their progeny.

District Court Judge McDade ignored preclusion which should have ended this case immediately. Court of Appeals Judge Coffey[4] did likewise. Judge McDade's actions so far exceed the proper bounds of judicial discretion as to be usurpative, violate Hook's due process rights and are plainly erroneous and highly prejudicial. Recusal is mandated in such circumstances. Judge Coffey[4] should have acknowledged bias evident in the record. Judge Coffey should have recognized that Judge McDade's disqualification was mandated. Judge Coffey should have recognized that vacatur of Judge McDade's patently erroneous orders was required, and that supervision by the Court of Appeals was required. Instead, he ignored the record, the bias and his responsibilities. *In the Matter of Rhone-Poulenc Rorer Incorporated, et al.*, 51 F.3d 1293 (7th Cir. 1995); *Kerr v. United States District Court*, 426 U.S. 394, 403 (1976); *Eisenberg v. United States District Court*, 910 F.2d 374, 375 (7th Cir. 1990); *In re Sandahl*, 980 F.2d 1118, 1119 (7th Cir. 1992); *United States v. Spilotro*, 884 F.2d 1003, 1006-7 (7th Cir. 1988).

Having failed to exercise its supervisory obligations, the Seventh Circuit Court of Appeals itself is now a proper subject for extraordinary writs of mandamus and supervision.

Judge McDade stated that the preclusion asserted by Defendant Hook "makes no sense" simply because this is a criminal case. However, the Supreme Court long ago

held that preclusion applied against the United States in criminal as well as civil cases and has repeatedly and consistently so held since. *United States v. Stauffer Chemical Co.*, 464 U.S. 165 (1984), *Montana v. United States*, 440 U.S. 147 (1979), *Ashe v. Swenson*, 397 U.S. 436 (1970), *Frank v. Mangum*, 237 U.S. 309, 333-334 (1915), *Coffey v. United States*, 116 U.S. 436 (1886). Indeed, the Supreme Court has described preclusion as a subset of double jeopardy. *Ashe v. Swenson*, 397 U.S. 436, 443.

In *United States v. Oppenheimer*, 242 U.S. 85 (1916), affirming the granting of a motion to quash indictment, Justice Holmes, in his characteristically succinct and definitive way, responded to the Plaintiff's assertion that preclusion existed in criminal law solely in the form of the Fifth Amendment proscription of double jeopardy as follows, at *Id.* 87:

> It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt.

and at *Id.* 88:

> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter v. Hewitt*, 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time.

In *Sealfon v. United States*, 332 U.S. 575, 580 (1948), the Supreme Court held that prosecution could be precluded where double jeopardy did not apply. In *Yates v. United States*, 354 U.S. 298 (1957), the Supreme Court acknowledged that prosecution may be precluded as a result of a prior civil action. Once a court has decided an issue of fact or law that precludes relitigation of the issue in a suit on a different cause of action involving the party to the first case. *Allen v. McCurry*, 449 U.S. 90, 94-95 (1980), *Montana v. United States*, 440 U.S. 147, 153-154 (1979). In *Nevada v. United States*, 463 U.S. 110 (1983) and *Sunshine Coal Co. v. Adkins*, 310 U.S. 381 (1940), the Supreme Court so held even where the parties were not the same.

PBGC v. Wittek Industries, Inc. is like these cases. The Plan was the subject of that litigation and a determination was made with respect to the Plan. This favorably affects the Defendants in this case, Viana because she was the trustee until replaced by the PBGC through *PBGC v. Wittek Industries, Inc.*, Hook because his purported criminality is based on an outdated version of 18 U.S.C. § 2 and averred fiduciary relationship, Plaintiff because it was a party, and everyone by application of ERISA.

PBGC v. Wittek Industries, Inc. gave the United States the very ruling that it sought, termination of the Plan as of February 13, 1991. Accordingly, appeal by the United States was not relevant or possible. Hook merely seeks to obtain the benefits that the United States sought and obtained. Furthermore, the termination decree was required by ERISA.[5] Thus, the legal issue has been frozen

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[5] 29 U.S.C. 1348(a)(4).

already by a statute which forecloses the judicial foreplay that *United States v. Mendoza*, 464 U.S. 154 (1984) prescribes. Accordingly, preclusion is not prevented by *Mendoza*.

PBGC v. Wittek Industries, Inc. affects only the Plan and the relationships of all persons to it, as contemplated under ERISA, not broad issues requiring open-ended judicial development of the law. Therefore even if preclusion were nonmutual in this case, *Mendoza* would not foreclose its application to Plaintiff; nor would *Standefer v. United States*, 447 U.S. 10 (1980), which held that nonmutual collateral estoppel will not apply against the United States if it derives from a criminal proceeding. *PBGC v. Wittek Industries, Inc.*, the precluding case, is civil. The limitations of which Chief Justice Burger speaks in *Standefer* have no application. The United States had its way in the civil litigation and cannot now complain that Hook is availing himself of the consequence of that case.

Venue. The Sixth Amendment to the Constitution and Rule 18, Fed. R. Crim. P. require prosecution "in a district in which the offense was committed," *Travis v. United States*, 364 U.S. 631, 635 (1961), quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946); *United States v. Chappell*, 854 F.2d 190, 191 (7th Cir. 1988), and where other appropriate criteria dictate, *Platt v. Minnesota Mining and Manufacturing*, 376 U.S. 240 (1964), "in the interest of justice" under Rule 21(b) of the Federal Rules of Appellate Procedure.[6]

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[6] Those factors are: (1) location of the defendant; (2) location of possible witnesses; (3) location of events likely to be

Judge McDade ignored that the relevant witnesses were outside the Central District. Judge McDade ignored that the relevant documents were originally from outside the Central District, and that the witnesses and the documents were being assembled there merely for the prosecutor's convenience.

Hook demonstrated prosecutorial manipulation and misrepresentation with regard to both the location of witnesses and documents. Judge McDade disparaged those due process arguments and told Hook not to waste his time with matters in which he was not interested. Judge McDade asserted falsely that Hook's extra cost was "highly exaggerated." He ignored the inescapable conclusion that the acts alleged to constitute violations occurred in either the Northern District of Illinois or the Eastern District of Michigan.

Comparative conditions of the dockets in the Central District and the Northern District, one of the least significant *Platt* factors, was the only other factor that Judge McDade considered. Such specific misjudgment was disapproved in *In re Scott*, 709 F.2d 717, 721 (D.C.App. 1983) (*per curiam*) (mandamus appropriate when court misapplies factors relating to transfer, and gives improper consideration to convenience of court).

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in issue; (4) location of documents and records likely to be involved; (5) disruption of the defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative inaccessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer. *Platt*, 376 U.S. 240, 244-245.

Venue is most appropriate for resolution by mandamus. *Wright, Miller, Cooper & Gressman,* Fed.Prac.& Proc. ¶ 3935 at p. 252 (West 1977). Mandamus is appropriate also when, as here, the trial judge misconceives the nature of his discretion or refuses to consider the Constitutional issue. *Platt,* 376 U.S. 240 (mandamus is the proper remedy when transfer has been ordered in violation of the limitations established in 28 U.S.C. § 1404(a)); *Bloom v. Barry,* 755 F.2d 356 (3d Cir. 1985) (mandamus proper where transfer ordered in violation of the limits established in 28 U.S.C. § 1404(a); *In re Scott, supra,* (same); *Jones v. Gasch,* 404 F.2d 1231 (D.C. App. 1967), *cert. denied* 390 U.S. 1029 (1968); *Pfizer, Inc. v. Lord,* 456 F.2d 532 (8th Cir. 1972). If wrongful transfer is remediable pretrial, so then wrongful non-transfer must be also.

Supervision. The Seventh Circuit should have addressed preclusion and venue, even if only to explain why those issues were not being addressed by that Court, *Will v. United States,* 389 U.S. 90 (1967). An appellate court that ignores the facts and issues of the actual case before it cannot be performing its proper function and must be corrected by its reviewing court. Whatever else may be said about mootness in this case, the Seventh Circuit's abdication of its functions is not mooted.

The Seventh Circuit Court of Appeals denied disqualification of Judge McDade by ignoring applicable current statutory and case law as well as the facts. The Seventh Circuit Court of Appeals abdicated its supervisory and appellate functions completely by failing even to take cognizance of issues of Constitutional dimension and first impression which preclude prosecution of this case. Such conduct continues a federal judicial crisis[4] in

the Seventh Circuit and the Central District that severely undermines respect for the federal judicial system and which only the Supreme Court has the ability to address and correct.

The Seventh Circuit opinion in this case is a "whitewash" obvious to anyone who examines the record. The opinion ignored Judge McDade's expressed hope of Hook's conviction and misapprehended how *Cannon v. Viana* and other egregious conduct of Judge McDade clearly evinced his deep bias, including his stated wish that he could sanction Hook for his motions to dismiss and to change venue, which Judge McDade mischaracterized as nonsense, based solely on his own judicial incompetence and lack of understanding, because of his belief that (i) preclusion did not apply to criminal proceedings as a matter of law, (ii) application of 18 U.S.C. § 2 was defined by the U.S. Attorney's out of date pronouncements based on its 1909 version rather than the language of the current statute and its application by the Supreme Court,[7] (iii) indictment defects could be cured by discovery and jury instructions, contrary to the 6th Amendment to the Constitution, *Russell v. United States*, 369 U.S. 749 (1962) and (iv) that venue was determined by the prosecutor's convenience rather than where the crime was alleged to have occurred, "hold[ing] that the record is devoid of any facts that would tend to demonstrate bias or an appearance of bias on the part of Judge McDade." (App. 14)

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[7] See discussion of the history of Section 2 and its historical and current versions in *Standefer v. United States*, 447 U.S. 10 (1980).

The Court of Appeals opinion also misstated the basis for Hook's assertion of bias based upon *Cannon*, wherein Judge McDade ruled inconsistently on Viana's summary judgment motion which Hook, her attorney, had filed and briefed on her behalf. Judge McDade's inconsistency cannot be explained except on the basis of prejudice in favor of his wife and against Viana and Hook. In Count II, Cannon alleged that Viana and her company ("Wittek") had violated Cannon's ERISA rights. Mrs. McDade's major insurance company client ("Kemper") had agreed to cover Count II. Judge McDade granted summary judgment as to this claim, Judge McDade's stated reason being that Cannon had no ERISA rights, thereby absolving Kemper of liability. In Count I, Cannon alleged she was fired by Viana and Wittek for exercising her ERISA rights. Kemper had disavowed coverage as to Count I. Judge McDade denied summary judgment as to Count I even though it was as dependent on whether Cannon had any ERISA rights as Count II. As set forth in the record, Judge McDade's bias derived from his wife's personal involvement in a major claim Hook, on behalf of Wittek and Viana, had put to Kemper and which it had dealt with adversarially and acrimoniously and then denied. *Cannon* was decided in the midst of this and pervasive false adverse publicity about Viana and Wittek and Hook's effective defense of them in numerous civil cases in Central Illinois. It was decided shortly before Petitioner's fees for his work in *Cannon* were substantially cut by Kemper with input from Mrs. McDade.[8]

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[8] Judge Coffey adopts Mrs. McDade's false assertion that Hook was committing malpractice in not representing Viana

Judge McDade's disqualification was required by 18 U.S.C. § 455(a)(1), as clearly it would have appeared to a thoughtful observer aware of all the facts that Judge McDade would not resolve the case on its merits. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988). Bad appearance existed from the onset in Judge McDade's expressed hope that Hook would be convicted, in the short shrift that Judge McDade gave to legitimate, dispositive defenses to Hook's prosecution, and in Judge McDade's reaction to Hook's Petition for Disqualification. It existed in the biased treatment of Hook and his clients *vis a vis* Kemper, his wife's major client (with whom Hook had an extremely acrimonious relationship in two significant matters known to Judge McDade's wife and through her to him). The totally aware thoughtful observer in these circumstances must conclude that Judge McDade would not decide any issues on their merits. To that date in the case he had not done so. He had not done so in *Cannon*.

There is a Constitutional dimension as well. Due process bars apparently biased judges from presiding, *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813 (1986) and *Hathcock v. Navistar Intern. Transport Corp.*, 53 F.3d 36 (4th Cir. 1995), as here, where Judge McDade crossed the line between that of impartial judge to adversary, *Taylor v.*

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and Wittek on appeal. However, Hook had been terminated by Viana and Wittek and he had so informed Kemper long before the appeal. Hook had also advised Kemper to get other counsel because he saw no point in defending Count I without recompense.

Hayes, 418 U.S. 488 (1974). Like the worst kind of adversary, Judge McDade ignored all legal issues, effectively and actually denied Hook his due process right to have his motions considered and precluded argument thereof in favor of emotional, injudicious and personal attacks on Hook, culminating in the exchange in which he wished Petitioner's conviction. The record also shows such favoritism for the government as to amount to a license for misconduct. Judge McDade had already tried and convicted Hook based solely on Hook attempting to inconvenience the judicial system by defending himself.

Not only was there the appearance of bias. It actually existed as evidenced by the diametrically opposite *Cannon* decisions, by Judge McDade's refusal to entertain Hook's meritorious motions, by his expressed hope for Hook's conviction, and by his reaction and comments with respect to his recusal. The Seventh Circuit pretended none of this was present.

The Seventh Circuit was content to note that since Judge McDade had not called Hook a disloyal Nazi, citing *Berger v. United States*, 255 U.S. 22, 28 (1921), the record was "devoid" of bias. Whether *Berger* ever accurately defined the limits of bias, it has been superseded by statute and more correct constitutional views. Current law after *Liteky v. United States*, 510 U.S. 540 (1994), is that judicial remarks during the course of trial may support a bias or partiality challenge if they reveal an opinion that derives from an extrajudicial source, and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. Clearly, Judge McDade's judicial remarks were within the disqualifying penumbra.

Judge Coffey's argument regarding 18 U.S.C. § 455(b)(4) ignored[4] that Defendant Viana will in fact be tried, *in absentia*, based upon the prosecution's false assertion of record that she is a "fugitive from justice," and based upon the fact that in any event she is a party, that through his wife Judge McDade does have an interest in Viana as a party and for that matter, also in what happens to Hook. That interest derives from the Kemper claim that Hook filed on behalf of Viana and Wittek, which Kemper acrimoniously contested and denied and from the *Cannon* case which McDade's firm botched in monitoring and then on appeal. Among the interests are to lay blame elsewhere than on McDade and her firm, to preclude any adverse repercussion in their relationship with Kemper, to retaliate against Hook and Viana for the McDade's vindication and Kemper's. Nurturing the Kemper relationship has huge economic consequence for McDade, McDade's firm and ultimately Judge McDade.

The Seventh Circuit ignored Judge McDade's bias against Hook evident in Judge McDade's summary refusal to permit replies to be filed and other conduct of record, rendering no decision whatsoever as to them, indeed, making no mention of them in the opinion at all. The Seventh Circuit ignored preclusion, the constitutional and other bases for change of venue and the need for judicial and prosecutorial supervision. In short, the Seventh Circuit ignored its obligations to address the actual facts and legal issues presented to it, i.e., to act responsibly as an appellate court.

Mootness. Issues of mootness deserve exposition by the Supreme Court pursuant to a writ of certiorari. Judge McDade disqualified himself for bias subsequent to the

appellate opinion. However, the effect of his decisions linger uncertainly over the case. Seventh Circuit Court cases suggest that such decisions may not be vacated and may preclude the different correct decisions by another presiding District Judge even where the Seventh Circuit decides that bias exists.

Even though Judge McDade has now disqualified himself for actual and apparent bias, his prior orders have not been vacated. Furthermore, they will not be vacated in the Seventh Circuit, given Judge Coffey's prejudicial opinion[4] and *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985) and *New York City Housing Development Corp. v. Hart*, 796 F.2d 976 (7th Cir. 1986) [*obiter dictum*], which are contrary to *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), *In re School Asbestos Litigation*, 977 F.2d 764 (3rd Cir. 1992),[9] *Moody v. Simmons*, 858 F.2d 137 (3rd Cir. 1988), *Rohrbach v. AT&T Nassau Metals Corp.*, 902 F. Supp. 523 (M.D. Pa. 1995), *TCF Film Corp. v. Gourley*, 240 F.2d 711 (3rd Cir. 1957), *Hatchcock v. Navistar*, 53 F.3d 36 (4th Cir. 1995), *In re GMC*, 61 F.3d 256 (4th Cir. 1995), *In re Continental Airlines Corp.*, 901 F.2d 1259 (5th Cir. 1990), and which require vacation and *de novo* review. The formulation of *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989) is sufficiently problematic as not to provide any effective remedy for Judge McDade's orders.

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[9] Indeed, this Third Circuit opinion notes its conflict with the Seventh Circuit, criticizes *Murphy* and *New York Housing* as overly simplistic and concludes: "At all events, under the Seventh Circuit's logic, retrospective relief of the type approved in *Liljeberg* would never be available. Accordingly, *Liljeberg* must be read as overruling the Seventh Circuit's bright line rule."

The Seventh Circuit cases that follow *Liljeberg* in time give no sense that they follow it as precedent. While giving lip service to *Liljeberg*, *Coclanes v. Sagun*, 1996 U.S. App. LEXIS 12614 (7th Cir. 1996) (unpublished) fails to react properly to it while affirming the continuing viability of *Murphy*. *In re Edgar*, 93 F.3d 256 (7th Cir. 1996) grants mandamus removing Judge Duff but asserts that ancillary issues need not be resolved.

Also, Judge Coffey made no valid judicial determination whether Judge McDade was biased as Hook's petition for mandamus asserted. Judge Coffey's analysis was flawed and highly prejudicial[4] for the reasons set forth herein. Judge McDade never responded, not even in his order of disqualification. Therefore the bases for vacatur are unresolved, including whether Judge McDade's disqualification merely followed Judge Coffey's suggestion at the end of his opinion,[4] whether the disqualification is an expression of bias resulting from the comments made by Hook about him in the motion to disqualify him and the mandamus papers, and what impact either such resolution or other resolution of his bias has on the issue of vacatur.

Thus, even though Judge McDade has disqualified himself for actual and apparent bias, Judge Coffey's opinion as to disqualification, including its factual and legal distortions,[4] remains ripe for supervisory review. His opinion and the Seventh Circuit precedents require address to conform with the decisions of other Circuits and the Supreme Court.

While Hook's application for extraordinary writs played out in the Seventh Circuit, the prosecutor closeted

himself with one or more grand juries to script a superseding indictment, presented September 30, 1996, essentially identical to the original. The Supreme Court must determine that such clandestine conduct and resultant superseding indictment cannot moot issues in a pending petition for writs. Otherwise, without hope of remedy, a defendant can be worn down by perpetual subjection to prosecution in an unconstitutional venue or for conduct which does not constitute federal crimes merely by repeated and secret unilateral prosecutorial conduct, a dangerous challenge to criminal justice, the judicial system, the Constitution and the Nation.

Neither Judge McDade's disqualification without vacatur of his orders nor the prosecution's surreptitious engineering of a superseding indictment which continues all of the original problems can be allowed to derail Hook's trip to the Supreme Court. *United States v. Salerno*, 481 U.S. 739, 744 (1987), *Porter v. Schweiker*, 648 F.2d 310 (5th Cir. 1981), *Doe v. Harris*, 696 F.2d 109 (D.C. Cir, 1982). "Otherwise, appellees could deliberately moot cases on appeal, thereby shielding erroneous decisions from reversal . . . Approval of such a strategy would render the bizarre result that judgments mooted on appeal would have greater preclusive effect than cases susceptible of review." *In re Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 73 (2d Cir. 1991). The Seventh Circuit appears to take a contrary view, theorizing that district court decisions do not have precedential effect. *Clark Equipment Co. v. Lift Parts Mfg. Co.*, 972 F.2d 817, 818-20 (7th Cir. 1992), *In re Smith*, 964 F.2d 636, 638 (7th Cir. 1992), *Harris v. Board of Governors*, 938 F.2d 720, 723 (7th Cir. 1991), *United States v. Articles of Drugs Consisting of 203 Paper Bags*, 818 F.2d 569,

572 (7th Cir. 1987). These Seventh Circuit cases also must be immediately and definitively rejected by the Supreme Court.

The misapplication of 18 U.S.C. §§ 2, 664, 1343, and 1956 in this case, and the Seventh Circuit's blind opinion constitute egregious abuses requiring Supreme Court writs of certiorari, prohibition and supervision which cannot be circumvented *post hoc* by Judge McDade belatedly admitting his bias and disqualifying himself without also fully remediating the damage his bias caused, or by a superseding indictment substantively identical to the original indictment. Any assertion that Hook is thereby afforded an opportunity to make identical challenges to a new judge is patently vacuous. Existing Seventh Circuit precedent is harbinger to the doom of such challenges.

CONCLUSION

This petition for writs should be granted. The Seventh Circuit Court of Appeals should be admonished and compelled to address the actual facts and issues of the case before it rather than pretermit them based upon Judge Coffey's habitual practice of reordering and ignoring facts to suit his preconceptions. While ignoring the bias, he suggested that Judge McDade step aside, side stepping the real issues of the case.[4] The Central District Court and the United States Attorney should be precluded from prosecuting Defendants. The issues of disqualification, preclusion, venue and mootness should be addressed substantively so that this case is properly

resolved at this time and so that the federal judicial system can have a clear pronouncement from the Supreme Court as to these very important issues. The Supreme Court needs to state absolutely and unequivocally that bias disqualifies.

The Supreme Court's exercise of its supervisory responsibilities is imperative. Given the physical limitations of its certiorari docket, the Court may conclude that the serious problems that this case demonstrates, even though endemic within the Seventh Circuit and Central District of Illinois, nevertheless may be addressed effectively by granting certiorari to vacate the lower Courts' decisions and remand with instructions for appropriate remedy as provided by 28 U.S.C. § 2106 without full-blown treatment. *Stutson v. United States*, 116 S.Ct. 611 (1996).

Respectfully submitted,

GEORGE C. HOOK

APPENDIX

Page

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-2793

GEORGE C. HOOK,

Petitioner,

v.

THE HONORABLE JOE BILLY MCDADE, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS,

Respondent.

Petition for Writ of Mandamus
to the United States District Court
for the Central District of Illinois.
No. 95 CR 10010 – **Joe Billy McDade,** *Judge.*

ARGUED DECEMBER 5, 1995 – DECIDED JULY 9, 1996

Before HARLINGTON WOOD, JR., COFFEY, and MANION, *Circuit Judges.*

COFFEY, *Circuit Judge.* George C. Hook, an attorney, was indicted along with Carmen Viana, the owner of Wittek Industries, for stealing funds from the Wittek company's employee pension plan, in violation of 18 U.S.C. § 664; wire fraud, in violation of 18 U.S.C. § 1343; and money laundering, in violation of 18 U.S.C. § 1956. Viana fled to Brazil and there is an outstanding warrant for her

arrest, although according to the Assistant United States Attorney, extradition is unlikely. After the trial judge had denied a number of Hook's pretrial motions, Hook requested that the trial judge, the Hon. Joe B. McDade, recuse himself, pursuant to 28 U.S.C. § 455. After the district court denied the motion, the defendant Hook petitioned this court for a writ of mandamus to order the recusal of the district court judge. We deny the petition.

I. BACKGROUND

The factual grounds that give rise to Hook's claim of judicial bias in his criminal trial arose from a civil lawsuit (the *Cannon* litigation) filed in 1993 before Judge McDade. In that suit, Holly Cannon, a former secretary of Wittek Industries (an automobile parts manufacturer in Peoria, Illinois) sued her former employer, as well as its owner, Carmen Viana, and the Blue Cross Blue Shield Health Plan, claiming that she had been improperly denied health benefits under the Employee Retirement Income Security Act of 1974 (ERISA). Carmen Viana, over the objection of her insurance company, Kemper (who provided insurance coverage for employee suits regarding benefits), retained attorney George Hook to defend the action. The district court (Judge McDade) granted summary judgment for Wittek, Viana, and Blue Cross; the secretary appealed and Hook submitted a $10,000 legal bill to the insurance company.

The insurance company believed Hook's legal fees to be excessive, refused to pay the same, and in November

1994 Kemper Insurance retained the firm of Quinn, Johnston, Henderson, and Pretorius to review Hook's attorney's fees. One of the attorneys at the Quinn firm was Mary McDade, the wife of Judge McDade and she was assigned to review the legal charges. Upon the Quinn firm's recommendation, the insurance company paid only 75 percent of the bill and at this time Hook withdrew his representation for the appeal. According to Hook, Mary McDade, in the course of her review of Hook's legal bill, questioned whether Hook's termination of representation for Wittek and Viana during the time period when their appellate brief was due in the Seventh Circuit might be considered as and constitute legal malpractice.

In January 1995, prior to oral argument in *Cannon* before this court, Mary McDade withdrew as counsel for the defendants. Her firm, however, continued to represent Wittek and Viana on appeal.[1]

In February 1995, an indictment was returned against George Hook and Carmen Viana, Wittek's owner, alleging that from about June to September 1992, Hook and Viana transferred and embezzled funds from a pension plan sponsored by Wittek for its employees, in violation of 18 U.S.C. §§ 664 (theft from an employee benefit plan), 1343 (wire fraud), and 1956 (money laundering). Viana is believed to have fled to Brazil.

Prior to his arraignment on May 25, 1995, Hook filed a motion for a bill of particulars, a motion to transfer the

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[1] This Court ultimately reversed the district court's summary judgment order, *Cannon v. Wittek*, 60 F.3d 1282 (7th Cir. 1995).

case from the Central to the Northern District of Illinois, and a motion for discovery. On the day of his arraignment, Hook filed a motion to dismiss. At a hearing on June 29, 1995, Judge McDade denied Hook's motion to dismiss, as well as his motion to transfer, stating that he thought Hook had exaggerated the expense of having to travel to Peoria from Chicago for the trial. The district court granted in part the defendant's motions for a bill of particulars and for discovery.

One week later, on July 7, 1995, Hook filed his motion requesting that Judge McDade recuse himself from Hook's case and vacate any orders previously issued, claiming that Judge McDade had been influenced by his wife's assessment of Hook's conduct in the *Cannon* litigation, and that there was an appearance of bias. On July 14, 1995, Judge McDade conducted a hearing on this motion and stated in part:

> [L]et me start off by saying I find the motion totally offensive and I consider it to impugn my integrity and [it is] unprofessional for a lawyer to knowingly make a false statement impugning the integrity of the judge . . . you have not acted like an officer of the court in filing this motion.

Judge McDade then questioned Hook under oath. Hook stated that he felt there was an inherent conflict of interest because of Mary McDade's (Judge McDade's wife) representation of Viana, Hook's co-defendant, during the initial stages of the appeal of Judge McDade's grant of summary judgment to Viana and Wittek on a former employee's health insurance claim in *Cannon*.

Hook further cited the fact that Mary McDade had questioned in conversation whether Hook, who had represented Viana (and Wittek) during the *Cannon* proceedings, might have exercised bad judgment and committed malpractice in withdrawing as counsel when an appellate brief was due in the Seventh Circuit on behalf of his clients. Hook went on to state that he was "aghast by" Judge McDade's ruling on his motions. After hearing Hook's version, Judge McDade replied that Hook's motions were without merit. Hook also asserted on the record that he believed that Judge McDade gave his arguments "very short shrift" and further complained that the court had denied him the opportunity to file replies to the government's responses to his motions. Following this colloquy, Judge McDade denied Hook's motion to disqualify himself as the presiding judge and the accompanying motion to vacate his orders.

On July 31, 1995, on the date that his trial was to begin, Hook filed the instant petition for a writ of mandamus with this court, requesting that we order Judge McDade to disqualify himself from the case.

II. DISCUSSION

Hook argues that section 455 of Chapter 28 of the United States Code mandates that Judge McDade disqualify himself from Hook's trial. That section provides in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> . . .
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455.

The district court judge refused to disqualify himself; Hook has petitioned this court to issue a writ of mandamus to order the judge disqualified.[2] Our review of the petition is de novo. *Taylor v. O'Grady*, 888 F.2d 1189, 1201 (7th Cir. 1989) (citing *Balistrieri*, 779 F.2d at 1201).[3] We

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[2] A petition for a writ of mandamus is an extraordinary remedy, but the only recourse available to challenge a judge's denial of a motion for disqualification under 28 U.S.C. § 455. *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 117-18 (7th Cir. 1977) (granting writ of mandamus to disqualify district court judge under 28 U.S.C. § 455(b)); *United States v. Balistrieri*, 779 F.2d 1191, 1205 (7th Cir. 1985), *cert. denied*, 475 U.S. 1095 (1986) (granting petition for writ to disqualify district court judge under 28 U.S.C. § 455(a)). *United States v. Towns*, 913 F.2d 434, 443 (7th Cir. 1990) (collecting cases).

[3] We note that the Fifth and the Second Circuits review disqualification motions for an abuse of discretion. *See In re*

will consider each applicable provision of section 455 in turn.

A. Disqualification under 28 U.S.C. § 455(a)

28 U.S.C. § 455(a) requires a federal judge to *"disqualify himself in any proceeding in which his impartiality might reasonably be questioned."* We have stated:

> Section 455(a) asks whether a reasonable person perceives a significant risk that the judge will resolve the case on a basis other than the merits. This is an objective inquiry. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 865 (1988); *New York City Housing Develop. Co. v. Hart*, 796 F.2d 976 (7th Cir. 1986); *Pepsico, Inc. v. McMillen*, 764 F.2d 458 (7th Cir. 1985). An objective standard is essential when the question is how things appear to the well-informed, thoughtful observer rather than to a hypersensitive or unduly suspicious person. . . . Trivial risks are endemic, and if they were enough to require disqualification we would have a system of preemptory strikes and judge-shopping, which itself would imperil the perceived ability of the judicial system to decide cases without regard to persons. A thoughtful observer understands that putting disqualification in the hands

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Billedeaux, 972 F.2d 104, 106 (5th Cir. 1992); *In re Drexel Burnham Lambert Inc.*, 861 F.2d 1307, 1312-13 (2nd Cir. 1988), *cert. denied*, 490 U.S. 1102 (1989). However, dissenting opinions in both cases argue that the abuse of discretion standard is inappropriate for allegations of judicial bias. *Billedeaux*, 972 F.2d at 106-107 (DeMoss, J., dissenting); *Burnham*, 861 F.2d at 1321 (Lumbard, J., dissenting).

> of a party, whose real fear may be that the judge will apply rather than disregard the law, could introduce a bias into adjudication. Thus the search is for a risk substantially out of the ordinary.

In re Mason, 916 F.2d 384, 385-86 (7th Cir. 1990).

Hook argues that Mary McDade, the Judge's wife, formerly represented Carmen Viana, a co-defendant in Hook's criminal trial, and that fact raises the appearance of bias.

As a threshold matter, certainly we agree that a judge's spouse or close relation cannot appear as counsel in any trial or proceedings before that Judge. Further, the Judicial Code of Conduct directs a Judge should be disqualified if the law firm in which his or her spouse is a partner appears before the Judge. *See* Canon 3C(1) of the Judicial Code of Conduct (1994); Advisory Opinion No. 58 (1993). However, we emphasize that neither Mary McDade nor the Quinn firm has ever appeared before Judge McDade in any proceeding relating to the civil suit or the criminal case. The Quinn firm entered the *Cannon* litigation for the sole purpose of reviewing Hook's legal fees submitted to Kemper (Wittek and Viana's insurance company) and represented Viana's interests on appeal in the civil case only after George Hook withdrew from the case. The Quinn firm became involved in the case *after* Judge McDade had ruled, and the insurance company did not challenge the court's decision, but merely sought review of the legal fees that Hook presented to the insurance company for payment.

Further, the *Cannon* case has no bearing on Hook's criminal trial. The issue in *Cannon* was whether an employee had worked sufficient consecutive days at Wittek to qualify for Blue Cross coverage under the terms of Wittek's health insurance plan. In contrast, Hook has been indicted (along with Carmen Viana, Wittek's owner) for illegally transferring funds from Wittek's pension plan. The issues raised in the *Cannon* case concerning an employee's qualification for health insurance benefits are not related to and do not influence the criminal allegations that Hook and Viana stole from the Wittek pension fund. Neither Mary McDade nor the Quinn firm is involved in the criminal trial of Hook and Viana. Finally, Carmen Viana has fled to Brazil, and as far as this record recites she seems unlikely to be a participant in either the criminal trial or any further civil proceedings in *Cannon*.

We fail to see how the involvement of Judge McDade's wife in an unrelated civil suit involving one of the same parties could lead to the appearance of an impartial criminal trial. From the facts in the record, we disagree with Hook that there is any bias that can reasonably be inferred from Mary McDade's involvement in the suit that would justify the disqualification of Judge McDade. *See Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1375 (7th Cir. 1994) (en banc) (holding that recusal was not required in a murder trial on the ground that the judge had prosecuted the defendant for a different murder fourteen years earlier); *United States v. Barnes*, 909 F.2d 1059, 1072 (7th Cir. 1990) (holding that bias alleged to have been caused by past cases (and the present case) in which the judge and litigant were involved was not grounds for the judge's disqualification).

B. Disqualification Under 28 U.S.C. § 455(b)(1)

A federal judge must disqualify himself from a proceeding, *"[w]here he has a personal bias or prejudice concerning a party. . . . "* 28 U.S.C. § 455(b)(1). In determining whether a judge must disqualify himself under 28 U.S.C. § 455(b)(1), "the question is whether a reasonable person would be convinced the judge was biased." *Lac du Flambeau Indians v. Stop Treaty Abuse-Wis.*, 991 F.2d 1249, 1255 (7th Cir. 1993) (citing *Taylor*, 888 F.2d at 1201; *Balistrieri*, 779 F.2d at 1202). "The negative bias or prejudice from which the law of recusal protects a party must be grounded in some personal animus or malice that the judge harbors against him, of a kind that a fair-minded person could not entirely set aside when judging certain persons or causes." *Balistrieri*, 779 F.2d at 1201. Moreover, recusal is required only if actual bias or prejudice is "proved by compelling evidence." *Id.* at 1202. Bias against a litigant must, however, arise from an extrajudicial source:

> [J]udicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. . . . *Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes

> display. A judge's ordinary efforts at courtroom administration – even a stern and short-tempered judge's efforts at courtroom administration – remain immune.

Liteky v. United States, 114 S. Ct. 1147, 1157 (1994). *See also United States v. Griffin*, 84 F.3d 820, 831 (7th Cir. 1996).

In the present case, Hook's claim of bias is rooted in Judge McDade's rulings and comment that he found the disqualification motion offensive. Hook also cites the fact that Mary McDade questioned Hook's handling of the *Cannon* matter. According to Hook, Mary McDade's legal evaluation and suggestion of possible malpractice should be imputed to her husband, Judge McDade, and are therefore evidence of the judge's prejudice. Hook also argues that Judge McDade's pre-trial rulings, such as Hook's motion for a bill of particulars and motion to transfer the case from the Central to the Northern District of Illinois, demonstrate his prejudice against Hook.

As noted above, unless there are exceptional circumstances, judicial rulings are grounds for appeal, not disqualification. After scrutiny of the record, we find nothing in Judge McDade's rulings or comments that demonstrate an alleged extrajudicial personal prejudice against Hook. The judge stated that he considered Hook's motion for disqualification "offensive," and thought that it "impugn[ed]" his integrity. In addition, the judge, after reviewing Hook's motion for disqualification, directed Hook to testify about the alleged bias under oath because he believed that Hook had failed to act as an ethical member of the bar in filing the recusal motion. *See In re Kelly*, 808 F.2d 549, 552 (7th Cir. 1986) (observing that

"lawyers who make statements to courts under oath concerning the conduct of fellow lawyers and judges and other participants in the administration of justice [must] be scrupulous regarding the accuracy of those statements."). While Judge McDade's remarks are critical of Hook, the Judge was reacting, albeit strongly, to a disqualification motion brought on the eve of trial concerning himself vis a vis his wife's participation in an unrelated trial, a motion that claimed that the Judge ruled against Hook's pre-trial motions based on personal prejudice. We can reasonably infer that the Judge's reaction (and surprise at the motion) demonstrates that he had no idea that Mary McDade had any prior involvement with either Viana or Hook. From our review of the transcript we do not believe that the Judge's comments in reaction to Hook's accusation of impartiality reflect a bias or prejudice gained from outside the courtroom that would lead a reasonable observer to conclude that McDade is incapable of ruling fairly in a case involving Hook. *See Liteky*, 114 S. Ct. at 1157.[4] Judge McDade's comments in the present case are clearly not of this nature and thus are not grounds for recusal. *See Federal Trade Comm'n v. Amy Travel Svc., Inc.*, 875 F.2d 564 (7th Cir.), *cert. denied*, 493 U.S. 954 (1989) (holding that friction between a judge and

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[4] As an example of a remark that would indicate a level of hostility from which one could conclude that a judge was biased against a litigant, the *Liteky* court has put forth the comment of Judge Kenesaw Mountain Landis. Judge Landis stated in a World War I espionage case that " '[o]ne must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans' because their 'hearts are reeking with disloyalty.' " *Id.* (quoting *Berger v. United States*, 255 U.S. 22, 28 (1921)).

counsel was not grounds for disqualification); *In re Drexel Burnham*, 861 F.2d at 1316 (holding that sharp criticism of petitioner's counsel's behavior is not grounds to find personal bias).

C. Disqualification Under 28 U.S.C. § 455(b)(4)

A federal judge is required to disqualify himself from a case, if "*[h]e knows that he . . . or his spouse . . . has a financial interest in the subject matter of the controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.*" 28 U.S.C. § 455(b)(4). Financial interest is defined as "ownership of a legal or equitable interest, however small. . . ." 28 U.S.C. § 455(d)(4). However, "where an interest is not direct, but is remote, contingent, or speculative, it is not the kind of interest which reasonably brings into question a judge's impartiality." *In re Drexel Burnham*, 861 F.2d at 1313. Hook argues that here that the judge's wife has a financial interest in the outcome of this case because her firm represents the insurance company of Carmen Viana, the absent co-defendant of Hook.

The Quinn law firm, of which Mary McDade is a partner, as a result of its representation of Viana's insurance company, did represent the financial interests of Carmen Viana in an appeal of a civil suit concerning health insurance. We fail to understand how Hook can allege that Judge McDade has a financial interest in the outcome of a criminal trial of Hook and Viana, whose issues have no relation to those raised in the civil case. As a threshold matter, Carmen Viana has fled the country and seems unlikely to participate in either the criminal

trial or civil proceedings in the *Cannon* litigation. Secondly, Hook's conviction (or non-conviction) would not seem to alter in any tangible fashion the business relationship between the Quinn firm and the insurance company. Hook has not demonstrated, and we are hard-pressed to envisage, any financial interest of Mary McDade's that is directly affected by the criminal trial of George Hook. We fail to understand under what circumstance Judge McDade might conceivably have a financial interest in the subject matter in controversy or in a party involved in Hook's case. *See In re Drexel Burnham*, 861 F.2d at 1316-17 (holding that district court judge has no financial interest warranting disqualification where his wife stood to gain $30 million in leveraged buyout of her family's business financed in part by an investment bank that is a co-defendant in an insider trading lawsuit brought by the Securities and Exchange Commission).

III. CONCLUSION

After review, we hold that the record is devoid of any facts that would tend to demonstrate bias or an appearance of bias on the part of Judge McDade. However, in light of Hook's personal accusation against Judge McDade of bias, the judge might want to consider whether the remote possibility of the *appearance* of bias might exist as a result of this attack on his integrity. We repeat that we neither infer nor suggest that Judge McDade should recuse himself for the record reveals absolutely no evidence of even an appearance of personal bias; the decision lies clearly with the judge.

Hook's petition for a writ of mandamus is

DENIED.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

August 19, 1996.

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

George C. Hook, *Petitioner,* No. 95-2793 v. The Honorable Joe Billy McDade, Judge, United States District Court For the Central District of Illinois, *Respondent.*	)	Petition for Writ of Mandamus to the United States District Court for the Central District of Illinois. No. 95 CR 10010 Joe Billy McDade, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by petitioner, George C. Hook, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing is DENIED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF NORTH CAROLINA**

In re: RETIREMENT PLAN FOR UNITED STEEL WORKERS LOCAL #6141 EMPLOYEES OF E.C. MANUFACTURING DIVISION OF WITTEK INDUSTRIES, INC.	Civil No. 3:95CV117-MCK
PENSION BENEFIT GUARANTY CORPORATION 1200 K Street, N.W. Washington, D.C. 20005-4026, Plaintiff v. WITTEK INDUSTRIES, INC. as administrator of the Retirement Plan for United Steel Workers Local #6141 Employees of E.C. Manufacturing Division of Wittek Industries, Inc. c/o CT Corp. Systems (Reg. Agent) 225 Hillsborough Street Raleigh, NC 27603, Defendant.	

DECREE

Upon the motion (the "Motion") of the Pension Benefit Guaranty Corporation ("PBGC") for an Order To Show

Cause and for a Decree Adjudicating that the Retirement Plan for United Steel Workers Local #6141 Employees of E.C. Manufacturing Division of Wittek Industries, Inc., Must Be Terminated, that PBGC Be Appointed Trustee, and that a Termination Date of February 13, 1991, Be Established; and it appearing that adequate and sufficient notice of the Motion has been given; and it appearing that good and sufficient cause for this decree has been shown; it is hereby

DECREED, ORDERED, and ADJUDICATED, pursuant to 29 U.S.C. § 1342(c), that the Retirement Plan for United Steel Workers Local #6141 Employees of E.C. Manufacturing Division of Wittek Industries, Inc. (the "Plan"), must be terminated in order to prevent any unreasonable deterioration of the financial condition of the Plan, and it is

FURTHER DECREED, ORDERED, and ADJUDICATED, pursuant to 29 U.S.C. § 1342(c), that PBGC be appointed trustee of the Plan with full authority to terminate the Plan under Title IV of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1301-1461 (1988 & Supp. V 1993), *as amended by* the Retirement Protection Act, Subtitle F, Title VII, Uruguay Round Agreement Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994), and with all other powers conferred on statutory trustees under 29 U.S.C. § 1342(d), and it is

FURTHER DECREED, ORDERED, and ADJUDICATED, pursuant to 29 U.S.C. § 1348(a)(4), that the date of plan termination for the Plan be established as February 13, 1991, and it is

FURTHER DECREED, ORDERED, and ADJUDICATED that Wittek Industries, Inc., and any other person or entity having possession, custody or control of any records, assets or other property of the Plan shall transfer, convey and deliver to PBGC all such records, assets and property.

Dated: March 30, 1995

/s/ H Brent McKnight
H. Brent McKnight
United States
Magistrate Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

CONSTITUTION:

Article III, Section 2 in relevant part:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority . . . to controversies to which the United States shall be a party . . .
>
> In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.
>
> The trial of all crimes . . . shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

5th Amendment in relevant part:

> . . . nor be deprived of life, liberty, or property, without due process of law . . .

6th Amendment in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .

8th Amendment in relevant part:

> . . . nor cruel and unusual punishments inflicted.

9th Amendment:

> The enumeration of the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

10th Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

STATUTES OF THE UNITED STATES:

18 U.S.C. § 2 (in its current form at all times relevant to this case):

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. § 2 (in its prior form):

> Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

18 U.S.C. § 664 (as in effect at time of alleged conduct) provides as follows:

> Any person who embezzles, steals, or unlawfully and wilfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.
>
> As used in this section, the term "any employee welfare benefit plan or employee pension plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

18 U.S.C. § 1343 (as in effect at time of alleged conduct) provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1956(a)(1)(B)(i) (as in effect at time of alleged conduct) provides in relevant part:

> (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> (B) knowing that the transaction is designed in whole or in part –
>
> (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.
>
> (c) As used in this section –
>
> (1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);
>
> (2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;
>
> (3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery,

or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given the term in section 5312(a)(2)[10]

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[10] 31 U.S.C. 5312(a)(2) provided at the relevant date as follows:

(2) "financial institution" means –

(A) an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act ((12 U.S.C. 1813(h)));

of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means –

(B) a commercial bank or trust company;

(C) a private banker;

(D) an agency or branch of a foreign bank in the United States;

(E) an insured institution (as defined in section 401(a) of the National Housing Act (12 U.S.C. 1724 (a)));

(F) a thrift institution;

(G) a broker or dealer registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934 (15 U.S.C. 78a et. seq.);

(H) a broker or dealer in securities or commodities;

(I) an investment banker or investment company;

(J) a currency exchange;

(K) an issuer, redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments;

(L) an operator of a credit card system;

(M) an insurance company;

(N) a dealer in precious metals, stones or jewels;

(O) a pawnbroker;

(P) a loan or finance company;

(Q) a travel agency;

(R) a licensed sender of money;

(S) a telegraph company;

(T) a business engaged in vehicle sales, including automobile, airplane, and boat sales;

(A) any act or activity constituting an offense listed in section 1961(1)[11] of this title except an act which is indictable under subchapter 11 of chapter 53 of title 31;[12]

(D) an offense under section [NONE RELEVANT]

28 U.S.C. §455 (as in effect at time of alleged conduct) provides in relevant part:

(U) persons involved in real estate closings and settlements;

(V) the United States Postal Service;

(W) an agency of the United States Government or of a State or local government carrying out a duty or power of a business described in this paragraph;

(X) any business or agency which engages in any activity which the Secretary of the Treasury determines, by regulation, to be an activity which is similar to, related to, or a substitute for any activity in which any business described in this paragraph is authorized to engage; or

(Y) any other business designated by the Secretary whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters.

[11] 18 U.S.C. 1961(1) provided in relevant part at the relevant date:

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 664 (relating to embezzlement from pension and welfare funds), . . . section 1343 (relating to wire fraud), . . . section 1956 (relating to the laundering of monetary instruments), . . .

[12] Not relevant.

(a) Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party . . .

(4) He knows that he . . . , or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) For the purposes of this section the following words or phrases shall have the meaning indicated

(4) "financial interest" means . . . a relationship as . . . adviser, or other active participant in the affairs of a party . . .

(e) No . . . judge . . . shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

28 U.S.C. § 1254 provides as follows:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal

> case, before or after rendition of judgment or decree; . . .

28 U.S.C. § 1651 provides as follows:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

29 U.S.C. § 1348 (as in effect at time of all relevant conduct) provides in relevant part:

> (a) For purposes of this title the termination date of a single-employer plan is –
>
> (4) in the case of a plan terminated under section 1341(c)[13] or 1342[14] of this title in any

---

[13] Relating to termination of multiemployer plans. Not relevant.

[14] 29 U.S.C. 1342 provided in pertinent part at the relevant time:

> (a) Authority to institute proceedings to terminate a plan. The corporation may institute

case in which no agreement is reached between the plan administrator and the corporation (or the trustee), the date established by the court.

---

proceedings under this section to terminate a plan whenever it determines that –

(1) the plan has not met the minimum funding standard required under section 412 of the Internal Revenue Code of 1986, or has been notified by the Secretary of the Treasury that a notice of deficiency under section 6212 of such Code has been mailed with respect to the tax imposed under section 497i(a) of such Code,

(2) the plan will be unable to pay benefits when due,

(3) the reportable event described in section 4043(c)(7) has occurred, or

(4) the possible long-run loss of the corporation with respect to the plan may reasonably be expected to increase unreasonably if the plan is not terminated.

The corporation shall as soon as practicable institute proceedings under this section to terminate a single-employer plan whenever the corporation determines that the plan does not have assets available to pay benefits which are currently due under the terms of the plan. The corporation may prescribe a simplified procedure to follow in terminating small plans as long as that procedure includes substantial safeguards for the rights of the participants and beneficiaries under the plans, and for the employers who maintain such plans (including the requirement for a court decree under subsection (c)). Notwithstanding any other provision of this title, the corporation is authorized to pool assets of terminated plans for purposes of administration, investment, payment of liabilities of all such terminated plans, and such other purposes as

it determines to be appropriate in the administration of this title.

(b) Appointment of trustee.

(1) Whenever the corporation makes a determination under subsection (a) with respect to a plan or is required under subsection (a) to institute proceedings under this section, it may, upon notice to the plan, apply to the appropriate United States district court for the appointment of a trustee to administer the plan with respect to which the determination is made pending the issuance of a decree under subsection (c) ordering the termination of the plan. If within 3 business days after the filing of an application under this subsection, or such other period as the court may order, the administrator of the plan consents to the appointment of a trustee, or fails to show why a trustee should not be appointed, the court may grant the application and appoint a trustee to administer the plan in accordance with its terms until the corporation determines that the plan should be terminated or that termination is unnecessary. The corporation may request that it be appointed as trustee of a plan in any case.

(2) Notwithstanding any other provision of this title –

(A) upon the petition of a plan administrator or the corporation, the appropriate United States district court may appoint a trustee in accordance with the provisions of this section if the interests of the plan participants would be better served by the appointment of the trustee, and

(3) The corporation and plan administrator may agree to the appointment of a trustee without proceeding in accordance with the requirements of paragraphs (1) and (2).

(c) Adjudication that plan must be terminated. If the corporation is required under subsection (a) of

this section to commence proceedings under this section with respect to a plan or, after issuing a notice under this section to a plan administrator, has determined that the plan should be terminated, it may, upon notice to the plan administrator, apply to the appropriate United States district court for a decree adjudicating that the plan must be terminated in order to protect the interests of the participants or to avoid any unreasonable deterioration of the financial condition of the plan or any unreasonable increase in the liability of the fund. If the trustee appointed under subsection (b) disagrees with the determination of the corporation under the preceding sentence he may intervene in the proceeding relating to the application for the decree, or make application for such decree himself. Upon granting a decree for which the corporation or trustee has applied under this subsection the court shall authorize the trustee appointed under subsection (b) (or appoint a trustee if one has not been appointed under such subsection and authorize him) to terminate the plan in accordance with the provisions of this subtitle. If the corporation and the plan administrator agree that a plan should be terminated and agree to the appointment of a trustee without proceeding in accordance with the requirements of this subsection (other than this sentence) the trustee shall have the power described in subsection (d)(1) and, in addition to any other duties imposed on the trustee under law or by agreement between the corporation and the plan administrator, the trustee is subject to the duties described in subsection (d)(3). Whenever a trustee appointed under this title is operating a plan with discretion as to the date upon which final distribution of the assets is to be commenced, the trustee shall notify the corporation at least 10 days before the date on which he proposes to commence such distribution. [(3)] In the case of a proceeding initiated under this section, the plan administrator shall provide the

corporation, upon the request of the corporation, the information described in clauses (ii), (iii), and (iv) of section 4041(c)(2)(A).

(d) Powers of trustee.

(1)(A) A trustee appointed under subsection (b) shall have the power –

(i) to do any act authorized by the plan or this title to be done by the plan administrator or any trustee of the plan;

(ii) to require the transfer of all (or any part) of the assets and records of the plan to himself as trustee;

(iii) to invest any assets of the plan which he holds in accordance with the provisions of the plan, regulations of the corporation, and applicable rules of law;

(iv) to limit payment of benefits under the plan to basic benefits or to continue payment of some or all of the benefits which were being paid prior to his appointment;

* * *

(vi) to do such other acts as he deems necessary to continue operation of the plan without increasing the potential liability of the corporation, if such acts may be done under the provisions of the plan; and

(vii) to require the plan sponsor, the plan administrator, a contributing or withdrawn employer, and any employee organization representing plan participants to furnish any information with respect to the plan which the trustee may reasonably need in order to administer the plan. If the court to which application is made under subsection (c) dismisses the application with prejudice, or if the corporation fails to apply for a decree under subsection (c) within 30 days after the date on which the trustee is

appointed under subsection (b), the trustee shall transfer all assets and records of the plan held by him to the plan administrator within 3 business days after such dismissal or the expiration of such 30-day period, and shall not be liable to the plan or any other person for his acts as trustee except for willful misconduct, or for conduct in violation of the provisions of part 4 of subtitle B of title I of this Act (except as provided in subsection (d)(1)(A)(v). The 30-day period referred to in this subparagraph may be extended as provided by agreement between the plan administrator and the corporation or by court order obtained by the corporation.

(B) If the court to which the application is made under subsection (c) issues the decree requested in such application, in addition to the powers described in subparagraph (A), the trustee shall have the power –

(i) to pay benefits under the plan in accordance with the requirements of this title;

(ii) to collect for the plan any amounts due the plan, including but not limited to the power to collect from the persons obligated to meet the requirements of section 302 or the terms of the plan;

(iii) to receive any payment made by the corporation to the plan under this title;

(iv) to commence, prosecute, or defend on behalf of the plan any suit or proceeding involving the plan;

(v) to issue, publish, or file such notices, statements, and reports as may be required by the corporation or any order of the court;

(vi) to liquidate the plan assets;

(vii) to recover payments under section 4045(a); and

(viii) to do such other acts as may be necessary to comply with this title or any order of the court and to

protect the interests of plan participants and beneficiaries.

(2) As soon as practicable after his appointment, the trustee shall give notice to interested parties of the institution of proceedings under this title to determine whether the plan should be terminated or to terminate the plan, whichever is applicable. For purposes of this paragraph, the term "interested party" means –

(A) the plan administrator,

(B) each participant in the plan and each beneficiary of a deceased participant,

(C) each employer who may be subject to liability under section 4062, 4063, or 4064,

(D) each employer who is or may be liable to the plan under [section][part] of subtitle B,

(E) each employer who has an obligation to contribute, within the meaning of section 4212(a), under a multiemployer plan, and

(F) each employee organization which, for purposes of collective bargaining, represents plan participants employed by an employer described in subparagraph (C), (D), or (E).

(3) Except to the extent inconsistent with the provisions of this Act, or as may be otherwise ordered by the court, a trustee appointed under this section shall be subject to the same duties as those of a trustee under section 704 of title 11, United States Code, and shall be, with respect to the plan, a fiduciary within the meaning of paragraph (21) of section 3 of this Act and under section 4975(e) of the Internal Revenue Code of 1986 (except to the extent that the provisions of this title are inconsistent with the requirements applicable under part 4 of subtitle B of title 1 of this Act and of such section 4975.

(e) Filing of application notwithstanding pendency of other proceedings. An application by the corporation under this section may be filed notwithstanding the pendency in the same or any other court of any bankruptcy, mortgage foreclosure, or equity receivership proceeding, or any proceeding to reorganize, conserve, or liquidate such plan or its property, or any proceeding to enforce a lien against the property of the plan.

(f) Exclusive jurisdiction: stay of other proceedings. Upon the filing of an application for the appointment of a trustee or the issuance of a decree under this section, the court to which an application is made shall have exclusive jurisdiction of the plan involved and its property wherever located with the powers, to the extent consistent with the purposes of this section, of a court of the United States having jurisdiction over cases under chapter 11 of title 11 of the United States Code. Pending an adjudication under subsection (c) such court shall stay, and upon appointment by it of a trustee, as provided in this section such court shall continue the stay of, any pending mortgage foreclosure, equity receivership, or other proceeding to reorganize, conserve, or liquidate the plan or its property and any other suit against any receiver, conservator, or trustee of the plan or its property. Pending such adjudication and upon the appointment by it of such trustee, the court may stay any proceeding to enforce lien against property of the plan or any other suit against the plan.

(g) Venue. An action under this subsection may be brought in the judicial district where the plan administrator resides or does business or where any asset of the plan is situated. A district court in which such action is brought may issue process with respect to such action in any other judicial district.

(h) Compensation of trustee and professional service personnel appointed or retained by trustee.

(1) The amount of compensation paid to each trustee appointed under the provisions of this title shall require the prior approval of the corporation, and, in the case of a trustee appointed by a court, the consent of that court.

(2) Trustees shall appoint, retain, and compensate accountants, actuaries, and other professional service personnel in accordance with regulations prescribed by the corporation.

No. 96-883

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

SANDRA PARKER, Individually and as the Next Friend of DANA M. PARKER, and DANA M. PARKER,

Petitioners,

VS.

RODNEY BOYER, DAN DELL, SIMON RISK, and MULTI-MEDIA KSDK, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI OF RESPONDENTS RODNEY BOYER, DAN DELL, AND SIMON RISK

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Rodney Boyer, Dan Dell, and Simon Risk respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 93 F.3d 445.

STATEMENT OF THE CASE

Plaintiff-Petitioners Sandra Parker, individually and as next friend of Dana M. Parker, and Dana M. Parker filed this action pursuant to 42 U.S.C. §1983 and Missouri law. The Parkers asserted federal and state law claims against numerous defendants in connection with the entry of the media into the Parkers' residence where police officers were executing a valid search warrant. Among other things, the Parkers alleged that Defendant-Respondent St. Louis City police officers Rodney Boyer, Dan Dell, and Simon Risk violated the Parkers' federal constitutional rights under the Fourth Amendment. The Parkers also asserted constitutional claims against Defendant-Respondent Multi-Media KSDK, Inc. (KSDK).

In their petition for writ of certiorari, Petitioners refer to a number of "facts," without referring to authority for them, which were neither undisputed on the summary judgment record nor found to be true in any proceeding below. The limited undisputed evidence on the summary judgment record, as recounted in the district court and Eighth Circuit opinions, showed in part the following. On February 9, 1994, at or around 6:00 p.m., Respondents Boyer and Dell were instructed at their roll call that they would be accompanied in their patrol car that evening by two employees of KSDK. During the course of their patrol, officers Boyer and Dell were presented with the opportunity to execute a valid search warrant which Boyer previously had obtained in order to search for controlled substances and firearms at the private residence located at 5242 Maple in St. Louis,

Missouri. At approximately 9:00 p.m., officers Boyer and Dell notified other members of the St. Louis City Police Department's Mobile Reserve Unit of the impending search, and other officers then responded at an agreed upon location near the Maple address.

Approximately seven responding officers—including Boyer, Risk, and Dell—proceeded to 5242 Maple to execute the search warrant. The resident individual targeted for possession of the items listed in the search warrant, Travis Martin, was detained by officers outside the residence. The officers made an unforced entry into the residence through the unlocked front door. In a search of the residence, officers recovered a .380 caliber pistol, a Cobray M-11 9 mm. assault pistol, and bags of a substance believed to be cocaine.

KSDK employees entered the residence behind the police, and took film footage and interviewed some of the police officers and some of the occupants of the residence. At some point during the course of the search, a Lieutenant arrived to supervise the scene. The detained suspect, Travis Martin, was arrested for controlled substance and firearm offenses.

At no time, either before, during or after the search, did any defendant police officer advise or give permission to KSDK personnel to enter the premises, take film footage or interview any occupant of 5242 Maple. Nor did any employee of KSDK request permission from any defendant police officer to enter the premises, take film footage or interview any occupant of 5242 Maple. Further, at no time did any occupant of the house ask any defendant police officer to prevent or stop KSDK from entering the premises, to have KSDK leave the premises, or to prevent KSDK from filming or interviewing. No other details appear on the record regarding the role of Respondents Risk, Boyer, or Dell with respect to the media. (Petitioner's App. 2a-4a, 17a-20a.)

Based on the foregoing, the district court entered its order granting partial summary judgment in favor of the Parkers and against Respondents Boyer, Dell and Risk, on the Parkers' Fourth Amendment claim. The district court granted summary judgment in favor of certain other defendants, including Respondent KSDK. The district court subsequently issued an amended judgment clarifying that it had rejected Boyer, Dell, and Risk's qualified immunity defense. (App. 15a, 30a.)

On interlocutory appeal, the Eighth Circuit Court of Appeals reversed the finding of liability against officers Boyer, Dell, and Risk and held the officers protected by qualified immunity for their limited roles in allowing KSDK to enter the premises and film portions of the search. The Eighth Circuit also upheld the district court's ruling that KSDK had not acted under color of state law, as it was undisputed that KSDK acted independently in deciding to enter the house and film and that neither KSDK nor the police assisted the other in their respective tasks. (App. 4a-6a.) The Court of Appeals then denied Petitioners' request for a rehearing en banc. (App. 10a.)

Petitioners now request that this Court grant certiorari, asserting, among other arguments, that the Eighth Circuit decision conflicts with *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 1689 (1995), and that the Eighth Circuit's qualified immunity analysis is otherwise flawed.

REASONS FOR DENYING THE PETITION

I. The Petition Should Be Denied Because The Claimed Conflict With The Second Circuit Does Not Justify Granting A Writ of Certiorari.

Contrary to Petitioners' argument, the decision below does not conflict with *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), *cert. denied*, 115 S.Ct. 1689 (1995), nor did *Ayeni* present a scenario identical to the one now before the Court. Further, even to the extent that this Court might conclude the decision below is inconsistent with *Ayeni*, such an inconsistency does not justify granting a writ of certiorari.

In *Ayeni*, the Second Circuit was presented with a factual scenario in which a secret service agent "invited" a CBS news crew into a home while conducting a search, the occupant of the home verbally objected to the videotaping of herself and her son and tried to hold a magazine to shield her and her son's faces, and the secret service agent responded by "grab[bing] the magazine out of [the plaintiff's] hand, thr[owing] it on the floor, and [telling] the plaintiffs to `shut up.'" 35 F.3d at 683. Agents then "*directed* the camera crew to videotape Mrs. Ayeni's face." *Id.* The *Ayeni* court held that the agent was not entitled to qualified immunity as his actions violated well-established general Fourth Amendment principles, even though the court could not point to any pre-existing case law or published text addressing the contours of the Fourth Amendment right at issue. *Id.* at 686.

In the decision below, the Eighth Circuit noted the existence of *Ayeni* but did not criticize the case or characterize it as in conflict with its own decision. While declining to conclude that the broad activity of "allowing" media entry into a home during a search violated self-evident Fourth Amendment principles, the Eighth Circuit held simply in the fact-specific context before it, "we cannot say that the kind of conduct in which police engaged in this case was a violation of a clearly established constitutional

principle of which the police, at the time they executed their search warrant, should have been aware." (App. 5a.)

Thus, while *Ayeni* and the present case both pertain to the presence of media during a search of a home, they present different factual scenarios—*Ayeni* a much more egregious one—and accordingly different results as to whether the particular defendants involved were protected by qualified immunity. Moreover, even if the results of the two cases can be said to be inconsistent, it is not an inconsistency warranting resolution by this Court. The specific contexts of the cases are not likely to recur, and there is plenty of room for development of precedent at the court of appeals level to further define the contours of the Fourth Amendment right at issue.

II. The Petition Should Be Denied Because The Eighth Circuit Correctly Decided Based On The Factual Circumstances Of This Case that Respondents Boyer, Dell, and Risk Are Protected By Qualified Immunity.

Admittedly, the Eighth Circuit chose not to engage in a protracted discussion of the contours of the Fourth Amendment right arguably at issue in this case, as the court concluded that the individual Respondent officers in any event would be protected by qualified immunity. This method of analysis, does not, however, warrant the grant of a writ of certiorari.

If this Court grants Petitioners' request for a writ of certiorari in this interlocutory appeal, a main issue before the Court will be whether the Respondent police officers were protected by qualified immunity for their alleged actions. In such an inquiry, it is important that the conduct is analyzed in its particularized context, and the question is whether the "contours of the right" allegedly violated were sufficiently clear when the official acted so that his conduct violated a clearly established statutory or constitutional right of which he should have known. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Mitchell v. Forsyth*,

472 U.S. 511, 530 (1985); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Qualified immunity protects all but the plainly incompetent or those who knowingly violate the law. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

Based on the little or no interaction that Respondent officers had with the media in this case, and based on the dearth of case law relevant to the officers' conduct published at the time of their conduct in February 1994, the Eighth Circuit correctly decided that, even if Petitioners' Fourth Amendment rights were implicated, the Respondent officers were protected by qualified immunity. Thus, the respective rights and liabilities of the parties would not be changed by the grant of a writ of certiorari. Further, based on the factual record, this case simply does not present a scenario which, if analyzed more deeply in the context of the Fourth Amendment, would lead to a definition of the contours and boundaries of the Fourth Amendment right arguably at issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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